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NBC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: In the Matter of Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, CS Docket No. 00-30

Dear Ms. Salas:

National Broadcasting Company, Inc. ("NBC") submits this letter to be included in the record of the above referenced proceeding concerning the proposed merger of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner").[1] NBC approaches this proceeding not only as the owner and operator of the NBC Television Network, but also as an independent multimedia programmer with broadly diverse holdings in the worlds of cable television and the Internet.[2] The proposed merger has enormous implications for programmers such as NBC that remain unaffiliated with distribution companies such as Time Warner and AOL.

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1 *America Online, Inc. and Timer Warner Inc. Seek FCC Consent for a Proposed Transfer of Control*, CS Docket No. 00-30, *Public Notice*, (DA 00-689) (rel. Mar. 3, 2000).

2 NBC owns and operates the NBC Television Network as well as thirteen television stations. In the United States, NBC owns CNBC, operates MSNBC in partnership with Microsoft, and maintains equity interests in Arts & Entertainment and the History Channel. NBC also has an equity stake in Rainbow Programming Holdings, a leading media company with a wide array of entertainment and sports cable channels, including the Madison Square Garden network, and ValueVision International. NBC also has extensive participation in the Internet and new media businesses. NBC owns 43.9% of NBC Internet Inc. ("NBCi"), serving as the media company's exclusive Internet portal, community and broad-based e-commerce service. NBC also holds equity stakes in CNET, Talk City, iVillage, Telescan, 24/7 Media, TiVo, Wink Communications, Gemstar, Intertainer and other new media companies.

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Overview

NBC is concerned that the fusion of Time Warner's cable distribution network and video and Internet content with AOL's Internet service system and content has the potential to affect materially competition in the Internet marketplace and especially in the emerging broadband marketplace. Aided by the "smart" technology in state-of-the-art routers and digital set-top boxes, the merged entity will have both the economic incentive and the ability to secure substantial competitive advantage by discriminating against unaffiliated content providers in the converged broadband marketplace encompassing both interactive television and the Internet. To safeguard against this potential harm, NBC urges that if the Commission decides to approve the merger, such approval should be conditioned upon a meaningful, enforceable commitment by AOL/Time Warner to provide nondiscriminatory access - - in terms of carriage, features, capabilities and services - - to unaffiliated content providers seeking to make either video programming or any other Internet-based content available on AOL/Time Warner's Internet platforms, including its broadband platform.[3]

In the past, NBC has consistently articulated its concerns about the potential for multichannel video programming distributors ("MVPDs") to utilize their gatekeeper power to control how, and the ease with which, viewers can access unaffiliated

[3] NBC recently announced a long-term agreement through 2008 with Time Warner Cable, which provides that company's subscribers with continued access to the programming of NBC's television stations, including both analog and digital signals, the CNBC and MSNBC programming services, as well as special extended coverage of the next five Olympic Games, starting with this fall's competition in Australia. That agreement did not address the types of discrimination concerns in the Internet and broadband marketplaces that are addressed herein.

programming carried on their systems.[4] In particular, NBC strongly supported enactment of Section 653(b) of the Communications Act, as part of the Telecommunications Act of 1996. That provision prohibits open video systems ("OVS") from discriminating against unaffiliated programming providers in the way information is presented to viewers on electronic program guides or other navigational devices. It addresses squarely the ability of MVPDs to steer viewers toward their affiliated programming by screen bias in the on-screen menus used to select programming.

NBC's longstanding concern about the potential for technological discrimination by the owner of the distribution network to distort the marketplace for content is greatly heightened by the proposed AOL/Time Warner merger. The reason is simple: this merger brings a powerful distribution and content provider in the cable arena together with a company with enormous power in the Internet arena, creating the ultimate powerful Internet and broadband platform. The ability of the merged entity to favor its affiliated content in both television and the Internet - - and in interactive television and electronic commerce applications where consumers will move instantaneously from television to web site ads to electronic purchases with a click of the remote control or mouse - - raises serious public policy issues regarding competition, the free flow of information and consumer access to diverse voices and content. As succinctly put by *The New York Times* in a recent editorial, the issue before the Commission in this proceeding is whether

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4 *See* Testimony of Scott Sassa, National Broadcasting Company Inc., before the Committee on Commerce Subcommittee on Telecommunications, Trade and Consumer Protection, U.S. House of Representatives, April 23, 1998 ("Sassa Testimony") ("[N]o gatekeeper, cable or any other MVPD, should be permitted to deprive consumers of receiving the full functionality of the DTV receiver they purchase.")

> the merged company [will] use its control of cable television's vital electronic pipeline to favor its own programs and deny competing programs fair access to millions of consumers along that pipeline. . . cable operators like Time Warner already provide high-speed access to the Internet . . . federal regulators, as they study the merger should be guided by the same principle in regard to Internet access and digital television services: nondiscrimination.[5]

NBC agrees with *The New York Times*. It is imperative that the Commission ensures nondiscriminatory treatment that results in full consumer access to all unaffiliated content, be it video programming, web sites or other broadband applications. If the combination of AOL and Time Warner is to go forward at all, the imposition of such nondiscrimination safeguards is essential to help ensure that the development of the infant broadband services market will be characterized by competition and unimpeded access for consumers.

<u>The Anticompetitive Potential from Combining the Assets and Subscriber Base of AOL and Time Warner Require That The Commission Prohibit The Merged Entity From Discriminating Against Unaffiliated Content Providers</u>.

Time Warner is the second largest cable operator in the United States with more than 13 million subscribers and a network that passes nearly 21 million homes.[6] In addition, Time Warner controls a vast array of affiliated broadcast and cable programming. Time Warner owns or controls: WB, a broadcast television network; Warner Brothers Studios; and cable television channels CNN, CNNfn, CNN Headline News, CNNsi, Cartoon Network, TNT, TBS, HBO and Turner Movie Classics among others. Significantly, Time Warner has exploited its cable pipeline to also become one of

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5 *Time Warner's Power Play*, Editorial, *The New York Times*, May 5, 2000.

6 *Broadcasting and Cable* at 28 (May 1, 2000).

the leading players in the broadband Internet marketplace, holding a 32 percent share of residential broadband Internet subscribers.[7]

For its part, AOL operates two world-wide Internet services, America Online which has more than 22 million subscribers, and CompuServe which has an additional 2.2 million subscribers. AOL's customer base represents more than 40 percent of the Internet subscriber market.[8] If merged, AOL/Time Warner would represent a breathtaking combination of content and distribution in new and existing media.

As the "gatekeeper" to the delivery of television to millions of households, AOL/Time Warner will have the power to determine what interactive capabilities NBC and other television programmers can provide to viewers.[9] Given the size and scope of the proposed merged company, AOL/Time Warner will have both the ability and the incentive to discriminate against unaffiliated content providers such as NBC. Importantly, with the rapid technical advances in router, set-top box and other electronics riding on and adjacent to the broadband network, this discrimination might not be as obvious and clear cut as blocking access, or imposing outright restrictions on competitive offerings. Rather, it might take the form of more subtle, but no less damaging, technical discrimination which would make it harder, more time consuming and less appealing to consumers to access unaffiliated content.

For example, AOL/Time Warner will be able to use its control over the way consumers access broadband Internet content to steer consumers towards affiliated

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7 *See* SBC Comments at 5.

8 *AOL/Time Warner: World's First Internet Age Media and Communications Company*, Bus. Wire, Jan 10, 2000.

9 See, e.g., Reply Comments of the Walt Disney Company.

service offerings and away from content supplied by unaffiliated entities. Once an AOL/Time Warner subscriber enters the AOL/Time Warner portal they can be directed subtly, and not so subtly, to AOL/Time Warner affiliated content. This steering can be accomplished by only providing direct links to affiliated programming, and even by downgrading the speed with which consumers can access certain web sites. In fact, Internet infrastructure manufacturers are specifically marketing equipment to cable operators that will provide the technical ability to discriminate against unaffiliated programming: "According to marketing materials from Cisco, cable companies will be able to work behind the scenes with sophisticated software to slow down and limit access to selected Web sites."[10] In the existing narrowband marketplace, such practices harm consumers by limiting their ability to freely "surf the net." However, in the broadband marketplace the harm caused by such practices will be compounded by creating a disincentive for the development and distribution of new broadband content.

In the broadband world the creation of interactive multimedia web sites will require significant investments in content production and distribution. Potential Internet content producers will hesitate to make such investments if their content will not be easily accessible to the millions of AOL/Time Warner broadband service subscribers. The end result will be a net reduction in the amount of information that any broadband Internet user can access. Clearly this result is anathema to the very notion of the Internet and the access to diverse sources of information that it provides.

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[10] *Open access' advocates use Cisco lit as ammo*, Reuters, Special to CNET News.com (July 29, 1999).

AOL/Time Warner will also have the ability to discriminate against unaffiliated programmers in the digital video programming universe. Specifically, AOL/Time Warner will have the ability to discriminate in the positioning of unaffiliated programming on the menus of electronic program guides ("EPGs"). By manipulating its proprietary EPG, AOL/Time Warner could force consumers to scroll through page after page of menu options to find unaffiliated programming, while AOL/Time Warner's own programming is conveniently organized and easily accessible. NBC has already highlighted the potential for this type of anticompetitive behavior in testimony before Congress:

> In a digital universe which may consist of hundreds of channels of programming, and where easy access to such programming is dependent to a large extent upon on-screen menus or other programming guides, the FCC must safeguard against broadcast programming being consigned to digital oblivion by discriminatory program guides.[11]

Similarly, AOL/Time Warner will be able to use positioning on its front screen to disfavor unaffiliated content, and to require that viewers return to that front screen every time they turn on their televisions, rather than stay with the programming they prefer.

The Department of Justice has identified this risk in another major merger, finding that "[b]y exploiting its 'gatekeeper' position in the residential broadband content market, AT&T could make it less profitable for unaffiliated content providers to invest in the creation of attractive broadband content, and reduce competition and restrict output in the market."[12] The same holds true in the case of AOL/Time Warner, and the risk is heightened by the fact that the merged firm in this case would have a large portfolio of

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11 Sassa Testimony at 11.

12 Competitive Impact Statement at 2, *United States v. AT&T Corp.*, Case No. 1:00CV01176 (RCL) (D.D.C., filed May 25, 2000).

content that competes with NBC and other programmers, and would have an even greater incentive to discriminate against unaffiliated content providers.

Unless the Commission acts now to establish firm principles of nondiscrimination in the treatment of unaffiliated content providers in the broadband services marketplace, AOL/Time Warner will have the necessary market power and technological capacity to block or otherwise discourage consumers from accessing unaffiliated broadband Internet content. Even a major content supplier such as NBC, with popular broadcast, cable and Internet-based content, is at risk of being significantly impaired in the marketplace absent imposition of enforceable nondiscrimination conditions upon the AOL/Time Warner merger.

The Commission Should Apply the Principles of Nondiscrimination Embodied in the 1992 Cable Act and Section 653(b) of the Communications Act to the AOL/Time Warner Merger.

The merger of Time Warner and AOL presents many of the same risks Congress addressed in the 1992 Cable Act. The Commission has had to address these issues in its carriage and program access rules and in a variety of other proceedings under the Act. The antitrust agencies have also addressed these concerns in merger proceedings, including Time Warner's merger with Turner Broadcasting. The same nondiscrimination principles that have been at the core of each of these matters should be applied here.

Moreover, in the Telecommunications Act of 1996,[13] Congress anticipated the potential for anticompetitive abuses arising from common control of an advanced video

[13] *See* 47 U.S.C. § 573.

programming distribution network and popular programming. Congress realized that, in the coming 500-channel universe, consumers will be dependent upon electronic program guides to select news, information and entertainment offerings. Such reliance would empower owners of the distribution network to skew viewer choice by influencing how these options are presented on the navigational devices.

Accordingly, Congress enacted Section 653(b) of the Communications Act. This provision of the Act concerns OVS operators, and includes a general prohibition against discrimination among video programming distributors,[14] as well as specific prohibitions designed to ensure that OVS operators do not favor their affiliates when interacting with consumers at the time of actual program selection (*i.e.* Congress prohibited OVS operators from unreasonably discriminating against unaffiliated entities when presenting information to subscribers on electronic program guides or other navigational devices to enable them to select programming).[15]

The prohibitions contained in Section 653(b) are designed to address the very type of competition concerns NBC has raised in this letter. The ability of OVS providers to discriminate against unaffiliated content providers in the way information is presented to viewers on EPGs or other navigational devices is dwarfed by the ability of a merged AOL/Time Warner to use "smart" technology, navigational software and digital set-top boxes to control consumer access to emerging broadband services. Accordingly, the Commission should be guided by Section 653(b) and condition any approval of the

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14 *See* 47 U.S.C. § 573(b)(1)(A).

15 *See* 47 U.S.C. §§ 573(b)(1)(E)(i)-(iv); 573(b)(2).

AOL/Time Warner merger with the imposition of clear safeguards that ensure nondiscriminatory treatment in consumer access to all content delivered on the AOL/Time Warner platform, be it video programming, interactive TV, web sites or other broadband applications.

More generally, it is essential that the Commission ensure that television programmers' ability to reach their audience not be comprised or diminished in any way by a dominant gatekeeper with strong incentives to favor its own content. Simply put, the Commission should require the merging parties to transmit broadcasters' content to viewers in unaltered form, and to refrain from any discrimination in the features, capabilities or services provided to unaffiliated content providers. It should require nondiscrimination in the placement of programming on a broadband provider's front screen. It should also prohibit AOL/Time Warner from interfering with a viewer's ability to access conveniently the programming he or she chooses by requiring the viewer to return to its front screen every time the set-top box is turned on.

Conclusion

By ensuring that the combined AOL/Time Warner is unable to discriminate against non-affiliated providers of content and protecting consumer access and choice in the Internet marketplace, and especially in the broadband services marketplace, the Commission will make significant progress toward ensuring that any approval of the AOL/Time Warner merger is in the public interest.

Sincerely,

Diane Zipursky

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